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DOUBLE PUNISHMENT UNDER STATE STATUE AND CITY ORDINANCE.—It has long been an established principal of law that a man could not be twice put in jeopardy for the same offense. Under the ancient common law, however, the plea of former jeopardy was allowed for different reasons and afforded a much broader protection to the offender than is the case under modern law. It was first allowed in felony cases only, and then because of the peculiar manner of punishing felons at common law. Under ancient criminal jurisprudence felonies were punishable by a total forfeiture of the offender's goods and a corruption of his blood. It was early held in England that a person being thus attainted might plead the same in bar to a subsequent prosecution for any other felony whatsoever, whether committed before or after the first conviction; for upon his once being attainted his entire possessions were forfeited, his blood corrupted and he became dead in law, and any further conviction or attainder would be fruitless.[1] This broad plea, however, was never received with favor, even in England, and consequently, by judicial exceptions, the rule became established that the plea of former jeopardy was not admissible, except where a second trial would be wholly superfluous. Thus, where the criminal was indicted for treason after an attainder of felony, in which case the punishment would be more severe, it was held that the former attainder would not prevent the second prosecution. This holding prevailed in England until the passage of a statute

[1] 17 Am. Dec. 791, note.

allowing the plea of former jeopardy only to second prosecutions for the same offense.[2]

The principle discussed above has never been generally accepted by the American authorities;[3] but it is a fundamental principle of our law, guaranteed by constitutional provisions, that a conviction or an acquittal of a crime is a bar to any subsequent prosecution based upon the whole or any part of the same offense.[4]

The doctrine of former jeopardy is often stated as a prohibition upon bringing a person a second time in jeopardy of life or limb;[5] but the principle is a general one and prevents a second jeopardy in cases of all crimes, whether felonies or misdemeanors.[6] To constitute jeopardy, the same offense must be twice dealt with penally, and punishing the wrongdoer after he has been sued civilly for the same act is not double jeopardy. As to when jeopardy begins in a prosecution for a crime the authorities are not agreed, but the better opinion seems to be that jeopardy does not arise until after the jury is properly sworn to make due deliverance of the case.[7] Once it arises, however, no matter how short the time, the trial must proceed to a legal termination, otherwise the accused will be forever discharged of the criminal accusation against him and he cannot thereafter be indicted for the same offense.[8]

It is held by the weight of authority that a prosecution for a lesser offense bars a subsequent prosecution for a greater offense in all cases where the lesser offense is a necessary and integral part of the greater, and vice versa.[9] This seems to be sound upon principle; because where a person is put in jeopardy for part and subsequently for the whole of a single crime, it is plainly double jeopardy as to the part.

By a single act two distinct offenses may be committed against the same jurisdiction; as in the case of a single sale of liquor, without a license, and to a minor, where the law of the place of sale makes it a criminal offense to sell without a license and also a criminal offense to sell to a minor. Here two distinct offenses are committed, and a prosecution for one will constitute no bar to a prosecution for the other. The doctrine of double jeopardy protects only against a second prosecution for the same offense, and not a double prosecution for the same act constituting separate offenses.[10]

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[2] Act of Parliament, 7 & 8 Geo. IV.

[3] There seems to be at least one court which has recognized the doctrine. Crenshaw *v.* State, 1 M. & Y. (Tenn.) 122, 17 Am. Dec. 788.

[4] State *v.* Cross, 101 N. C. 770, 73 S. E. 715, 9 Am. St. Rep. 53.

[5] Some courts, in view of this phrase, have restricted the constitutional prohibition to offenses punishable as felonies. State *v.* Smith, 53 Ark. 24, 13 S. W. 391.

[6] Ex parte Lang, 18 Wall 163.

[7] Ex parte Glenn, 111 Fed. 257.

[8] State *v.* Smith, *supra.*

[9] People *v.* Pearle, 76 Mich. 207, 42 N. W. 1109, 4 L. R. A. 709, 15 Am. St. Rep. 304; Moore *v.* State, 71 Ala. 307.

[10] Ruble *v.* State, 51 Ark. 170, 10 S. W. 262.

Again, the same act may constitute an offense against two jurisdictions, and in such case jeopardy in one is no bar to a prosecution in the other. Thus, the same act may be an offense against the United States and at the same time against one of the states, and may be punished by both.[11] This seems sound upon reason and principle; because the act violates the law of two separate and distinct sovereignties neither of which can forbid the other from punishing for a violation of its own law. Nor can the offender complain; because he has by the violation of the laws of both sovereignties committed an offense punishable by each.

This principle has been extended by some courts, which hold that if the same act violates both a general state statute and a city ordinance, both the state and the municipality may prosecute for the offense. Thus, in the recent case of *Shreveport* v. *Nejin* (La.), 73 South. 313, the defendant was convicted under a state statute for selling liquor, and it was held that such prosecution by the state did not bar a subsequent prosecution for the same act under a municipal ordinance. Where a municipal ordinance prohibits acts which are also penal offenses under the state law, considerable difficulty arises. Unlike the case of the United States and the state discussed above, the municipality is an agent or arm of the state government, and has no powers except those granted it by the state. Since a municipality is but the creature of a state, it follows that no city ordinance can stand which is in conflict with a state statute; nor can a city ordinance prohibiting acts which are also penal offenses under the state statute suspend or supersede the state statute. But it is generally accepted that ordinances are constitutional and stand, even though they cover the same crimes which are penal offenses under the state law, both laws being equally in force at the same time and place.[12] The question still remains, however: Can an offender, who by a single act violates both the state law and municipal ordinance, be prosecuted therefor by both the state and the municipality? It is believed that he cannot, and that the act is punishable alone by that power which first takes jurisdiction.[13] If the municipality first takes jurisdiction and prosecutes for the crime, it is in reality the state punishing through its agent; and for the state itself to later prosecute for the same crime would constitute double jeopardy. The same thing holds true where the state first prosecutes; it cannot later prosecute through its agent, the municipality.

An interesting question arises in this connection. Suppose that a state statute and a municipal ordinance cover the same crime, but the ordinance makes the act a less serious offense than the state statute. Will a prosecution under the city ordinance bar a subsequent prosecution under the state statute? The answer to this question should afford no difficulty, and the statement that only

[11] Commonwealth *v.* Barry, 116 Mass. 1.
[12] COOLEY, CONST. LIM., 6 ed., p. 239.
[13] Lynch *v.* Cohn (Ky.), 35 S. W. 264.

the first power that takes jurisdiction should punish seems to be true in this case, when the purpose of the state statute is considered. The general purport of the state statute is to protect the citizens of the state against the particular wrongful acts. To a municipality is delegated the power of prescribing by ordinance what acts committed within its jurisdictional limits shall constitute offenses against the peace of its citizens and to punish such offenses, that the people of that locality may protect themselves against the injuries of wrongdoers. The ordinances passed by a municipality in pursuance of this power are usually adapted to meet the peculiar needs of that locality. It is seen, therefore, that the purposes of the state law and of the municipal ordinance are identical. Though it might be said that the violation of a state law is an injury to all its citizens, yet the immediate injury falls upon the people of that locality in which the offense is committed, and it would seem that the act done would be primarily in violation of the local ordinance. A prosecution under it would satisfy the needs of the local citizens, and should, therefore, satisfy the demands of the state. This same manner of reasoning would apply in the reverse case, where the city ordinance makes the act a more serious offense than the state statute covering the same crime.

It is argued by some authorities that the single act constitutes two offenses, one purely local against the police regulations of the municipality, the other a violation of the state law.[14] And from this is often drawn an analogy to the concurrent jurisdiction of the state and federal courts.[15] This analogy, however, is unsound; because the municipality is not a distinct sovereignty, its only power emanating solely from the state. It is believed a more satisfactory reason for allowing a dual prosecution would be that the constitutional prohibitions against double jeopardy were never intended to apply to convictions under a mere police regulation.[16] And this view would seem to find support in those cases which permit conviction for the violation of the ordinance by summary proceedings, where if the act were punished as a violation of the statute an indictment and jury trial would be necessary.[17]

Another doctrine advanced to support these decisions is that the prosecution under the ordinance is a civil and not really a criminal proceeding. Such a view is not wholly without reason. Where, as at common law, the enforcement of the ordinance is by an action of debt for the fine, brought in the name of the city, the action is admittedly civil.[18] But where the proceeding is in the nature of a complaint the character of the action is much disputed. The cases necessarily turn largely upon the particular wording of

[14] Mayor *v.* Allaire, 14 Ala. 400.
[15] See State *v.* Ambrose, 6 Ind. 351.
[16] State *v.* Clifford, 45 La. Ann. 980.
[17] Ogden *v.* Madison, 111 Wis. 413, 87 N. W. 568; McInery *v.* Denver, 17 Colo. 302.
[18] 2 DILLON, MUN. CORP., § 634.

the state constitution and statutes.[19] In general, it seems to be held that if the violation of the ordinance is also a misdemeanor by the statute or the common law, the proceeding is criminal; otherwise, it is civil.[20] It is believed that this distinction is unsound. The character of the violation of a city ordinance is not altered by the criminality or non-criminality of the act under the statutes. The true test would seem to rest in the intention of the legislature in authorizing, and of the city in passing, such regulations. This is to be ascertained from the nature of the act prohibited, the penalty imposed and the method of procedure. Where the purpose of the ordinance is to render reparation to the city by a fine, the proceeding, even though by complaint, may well be considered civil as distinguished from criminal. On the other hand, if the object is to punish the offender, it would seem that the proceeding to collect the fine (unless it be an action of debt), and clearly the proceeding to impose a penalty of imprisonment, would be criminal in character. The doctrine, therefore, that proceedings for violations of municipal ordinances are civil in character would seem to be too broad.

EXHIBITION OF INFANT AS EVIDENCE IN BASTARDY PROCEEDINGS. —An examination of the many decisions dealing with the propriety of exhibiting an infant as evidence in bastardy proceedings reveals hopeless confusion among the courts of last resort. From the apparently irreconcilable conflict of opinions three doctrines may be extracted that furnish the fundamental basis for various modifications and exceptions to be noted hereafter.

The first of these doctrines holds that an inference of paternity from resemblance is one upon which a jury may reasonably act when both parties have been subject to their direct observation. Probative value is assumed without reference to the age or maturity of the spurious offspring, and the principle finds its justification in the theory that evidence should not be rejected merely on the ground that its bearing is not of a given degree of certainty.[1] In these cases the illusory nature of the resemblance is considered as rather imposing a duty on the court in conjunction with the weight to be given such proof than as militating against the relevancy of the inquiry; and in several cases an extension of the same doctrine has permitted such resemblance to be established by the testimony of witnesses without actual exhibition of the child in court.[2] As a practical issue, the admissibility of such evidence in this latter instance may well be questioned, and is denied by

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[19] See 33 L. R. A. 33, note.

[20] State *v.* Milwaukee, 89 Wis. 358.

[1] Killy *v.* State, 133 Ala. 195, 32 South. 56, 91 Am. St. Rep. 25; Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871.

[2] See Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600; 3 CHAMBERLAYNE, MODERN L., EV., § 2082.